



DEPARTMENT OF THE ARMY
NEW ENGLAND DIVISION, CORPS OF ENGINEERS
424 TRAPELO ROAD
WALTHAM, MASSACHUSETTS 02254

New Bedford
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49921

REPLY TO
ATTENTION OF:

August 2, 1988

Project Office
Operations Division

Mr. Frank Ciavattieri
U.S. Environmental Protection Agency
Waste Management Division
J.F. Kennedy Federal Building (HANCAN2)
Boston, Massachusetts 02203

Dear Mr. Ciavattieri:

This letter concerns the Pilot Study being carried out at the New Bedford Harbor Superfund Site.

We have tentatively agreed to a contract with Bean Dredging Corporation of New Orleans, LA under which they will provide the Matchbox Dredge. The contract has not been signed; however, due to questions the contractor has raised concerning environmental liability insurance.

Bean Dredging has located a firm who will provide environmental liability insurance to cover their participation in this project at a cost of \$130,000. The contractor has asked if the Government considers this to be a reasonable cost. Section H of the contract (copy attached) deals with this subject and states the following:

"The Contractor shall be reimbursed for the portion allocable to this contract, the reasonable cost of insurance (including reserves for self-insurance) as required or approved pursuant to the provisions of this clause."

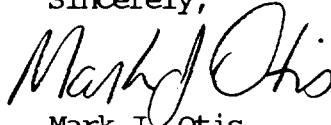
Our position is that this is not a reasonable cost and it would be in the Government's interest to indemnify the contractor against any liability as described in Section H of the contract. The following points are the basis for our position:

- o Bean Dredging will be one of three contractors who will be working on the Pilot Study. The contractor who is constructing the Confined Disposal Facility was unable to locate an insurer and it is unlikely that the other dredging contractor (a local firm) will be able to do so.
- o The risk of a lawsuit from Bean Dredging's operations (removing 2,500 cubic yards of contaminated sediment) is low as compared with the other contractors working on the project.

- o The \$130,000 cost for insurance is approximately 50% of the total contract amount (\$248,000).

The final decision on how to proceed is EPA's. Timely attention to this matter is requested as contract award will not take place until this issue is resolved. Please give me a call if there are any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark J. Otis". The signature is fluid and cursive, with the first name "Mark" and last name "Otis" clearly distinguishable.

Mark J. Otis
New Bedford Superfund
Project Office

SECTION H - SPECIAL CONTRACT REQUIREMENTS

~~1. PREFERENCE FOR LABOR SURPLUS AREA CONCERNS (APR 1984) 52.220-1~~

(a) This acquisition is not a set aside for labor surplus area (LSA) concerns. However, the offeror's status as such a concern may affect (1) entitlement to award in case of tie offers or (2) offer evaluation in accordance with the Buy American Act clause of this solicitation. In order to determine whether the offeror is entitled to a preference under (1) or (2) above, the offeror must identify, below, the LSA in which the costs to be incurred on account of manufacturing or production (by the offeror or the first-tier subcontractors) amount to more than 50 percent of the contract price.

(b) Failure to identify the locations as specified above will preclude consideration of the offeror as an LSA concern. If the offeror is awarded a contract as an LSA concern and would not have otherwise qualified for award, the offeror shall perform the contract or cause the contract to be performed in accordance with the obligations of an LSA concern.

2. By entering into this contract, the contractor certifies that neither it, nor any person or firm who has an interest in the contractor's firm, is a person, or firm ineligible to be awarded Government contracts by ~~virtue of being suspended or debarred in accordance with FAR subpart 9.4.~~

3. INSURANCE - LIABILITY TO THIRD PERSONS.

a. This Clause will be modified by mutual agreement of the parties within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA).

b. The Contractor further agrees that he will make diligent efforts throughout contract performance in accordance with the following guidelines to obtain adequate pollution liability insurance at a "fair and reasonable price."

c. Within 30 days of signing the contract, the Contractor must submit to the Government written documentation concerning the efforts he has made to date to secure pollution liability insurance coverage (e.g., a Contractor should submit a written statement from an insurance broker stating that the Contractor has attempted to secure pollution liability coverage from insurance carriers in the last 6 months).

d. If the Contractor has secured pollution liability coverage, he must submit to the Government a copy of the policy and declaration page; and every 6 months the Contractor must submit to the Government written documentation addressing the additional efforts the Contractor has made to secure pollution liability insurance coverage including:

(1) Copies of applications submitted to three known underwriters of pollution liability insurance.

(2) A status of any pollution liability insurance obtained. The report would include: (1) Type of coverage; (2) Premium charge; (3) Limits of coverage; (4) Deductible levels, and other major terms and conditions of the insurance coverage. A copy of the actual policy and declaration page may be provided in lieu of a written status report.

(3) If pollution liability coverage was denied by an underwriter, a summary of the reasons why such coverage was denied.

(4) A status report concerning the alternative pollution liability risk transfer mechanisms the Contractor has purchased other than commercial pollution liability insurance (e.g., risk retention groups, purchasing groups, association captives).

e. The Contractor agrees, to the extent and in the manner required by the Contracting Officer, to submit for the approval of the Contracting Officer all insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder. The Contractor's submission shall include documentation demonstrating his efforts to obtain pollution liability insurance.

f. The Contractor shall be reimbursed for the portion allocable to this contract, the reasonable cost of insurance (including reserves for self-insurance) as required or approved pursuant to the provisions of this clause.

(1) Pursuant to Section 119 of CERCLA, the Government will hold harmless and indemnify the Contractor against any liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance, pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance will not be covered under this clause.

(2) For purpose of paragraph 3f, if the Contracting Officer has determined that the insurance identified in paragraph 3b is not available at a reasonable cost, the Government will hold harmless and indemnify the Contractor for liability to the extent such liability exceeds \$100,000.00.

(3) The Contractor shall not be reimbursed for liabilities defined in paragraph 3f (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directives, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability other than negligence.

g. The Government may discharge its liability under this clause by making payment directly to the Contractor or directly to parties to whom the Contractor may be liable.

h. With prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontractors providing for indemnification within the purview of this clause shall provide for prompt notification to the Contractor which is covered by this clause, and shall entitle the Government, at its election, to control, or assist on the settlement or defense of any such claim or action. The Government will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The Government may discharge its obligation under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

i. If insurance coverage required or approved by the Contracting Officer is reduced without the Contracting Officer approval, the liability of the Government under this clause will not be increased by reason of such reduction.

j. The Contractor shall:

(1) Promptly notify the Contracting Officer of any claim or action against the Contractor or any subcontractors which reasonably may be expected to involve indemnification under this clause.

(2) Furnish evidence or proof of any claim covered by this clause in the manner and form required by the Government.

(3) Immediately furnish the Government copies of all pertinent papers received by the Contractor. The Government may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required in regard to such settlement or defense.

k. Reimbursement for any liabilities under this clause will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgements or by settlements approved in writing by the Government.

~~4. PAYMENTS. Payment shall be made for rental of the entire contract package consisting of the hydraulic dredge, Matchbox dredgehead, attendant plant, and specified services. Failure to provide any part of the contract package shall result in non-pay time. Pay time for contract operations will not begin until the following condition is met. The operator provided shall be familiar with the operation of the dredge and the operation of the equipment; he shall also demonstrate that he has sufficiently practiced operation of this plant in adjacent waters while pumping water in to the CDF, to insure that start-up time is minimal. The applicable contract price per hour referred to below is the rental price per hour in the specified item numbers as indicated on the bidding schedule.~~

a. Dredge and Disposal Payment Item No. 1.

(1) Pay time shall begin on the date and hour when the dredge actually commences operations on the initial assignment and material starts flowing through the pipeline. Payment for work in an Area will stop upon completion of the particular stage of work in that Area.

(2) The following will be considered effective time and will be paid at the contract price per hour calculated to the nearest hour: Actual time of dredging when the dredge is under operation with material being passed through the pipeline. Shutdown authorized, by the Contracting Officer, for the purpose of monitoring during dredging operations, shall be considered effective time and will be paid at 100% of the dredging rate.

(3) The following time will be considered noneffective time and will be paid at 70% of the contract price per hour, calculated to the nearest hour.

(a) Actual time lost due to moving and changing or swinging anchors, changing swing wires to previously prepared pennants, and making necessary changes in pipe lines or pontoon lines necessitated by the progress of the work such as attaching pontoons to the floating lines or shore pipe to the shore lines, adding or making changes at point of transition from floating line to shore line as may be necessary due to changing river stages or conditions; also actual time lost due to storm or hurricane of such intensity as to require cessation of dredging operation. Also, lay time for the convenience of the Government, said lay time not to conflict with or contradict shutdown time as provided elsewhere in these specifications.

(b) Actual time lost due to removal of logs, driftwood, etc. from the pump, pipeline, dredgehead or pontoon line, also necessary time lost ~~due to washing out pipeline before handling.~~